

10/9/92

STATE OF CALIFORNIA
BOARD OF EQUALIZATION
BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)
for Redetermination Under the) DECISION AND RECOMMENDATION
California Emergency Telephone)
Users Surcharge Law of:)
)
) No.
)
)
)
Petitioner)

The Appeals conference in the above-referenced matter was held by Staff Counsel Janice M. Jolley on , in Sacramento, California.

Appearing for Petitioner:

Appearing for the
Sales and Use Tax Department: Alfredo Michel, Jr.
Sr. Tax Auditor

Protested Items

The protested tax liability for the period July 1, 1984, through July 15, 1987, is measured by:

<u>Item</u>	<u>Amount</u>
A. Taxable revenue not reported	\$ 31,436,963.00
B. Claimed deductions disallowed	5,969,358.00
	\$ 37,406,321.00
Total additional charges subject to surcharge	x 0.005
Additional tax due	\$ 187,031.65

Petitioner's Contentions

1. Flat rate access charges are interstate in nature and should be exempt from the Emergency Telephone Users Surcharge Act (hereinafter "Emergency Act").
2. Federal law preempts an allocation of flat rate charges between taxable instate and nontaxable interstate use.
3. Subscription fees are not related to or credited against usage and are therefore not subject to tax.
4. Separately stated Emergency Act taxes and California Public Utilities Code fees collected by petitioner from customers are not revenues received from the provision of intrastate telecommunication services, and are therefore excludable from the measure of tax.
5. Petitioner properly deducted amounts paid for intrastate interconnection charges from revenues subject to the Emergency Act surcharge.

Issues 1 and 2 - Access Fees and Proration

Summary, Analysis and Conclusion

Until shortly before this audit period, petitioner provided only interstate long distance services in California. During the entire audit period, however, petitioner provided both intrastate and interstate long distance telephone services to California customers.

Petitioner also filed a petition at raising identical issues and arguments as they relate to the Moore Universal Telephone Service Act, Revenue and Taxation Code Section 44000, et seq. My Decision and Recommendation in that case is incorporated by reference as if fully set forth herein.

Except for the Code Sections involved, petitioner's arguments on Issues 1 and 2 in this petition are identical to those which I addressed in depth in the companion Decision and Recommendation. I concluded that tax is due on the flat rate monthly access charges which petitioner separately identifies on its bills to customers. I found that the monthly flat rate charge is a condition precedent to obtaining any telephone service whatsoever, whether intrastate or interstate, and

it is charged whether or not the client uses any long distance service at all during the billing period. I will therefore not further reiterate the issues except to state that I find these same charges are also subject to the Emergency Act surcharge under Revenue and Taxation Code Section 41000 et seq.

Issue 3 - Subscription Fees

Summary

Petitioner describes subscription fees as administrative fees imposed on its customers to obtain its services. Because of its alleged low profit operating margin, petitioner states that it charges "subscription fees" for services to insure a minimum recovery of its fixed costs. The subscription fees are flat rate charges to customers and are billed monthly regardless of whether any calls are made by the customer. They are not related to customer usage and are not credited toward any actual customer usage during the billing cycle.

Petitioner alleges that its "subscription fees" do not fall within the definition of intrastate telecommunication services subject to Revenue and Taxation Code Section 41020, as defined in Sections 41010 and 41015(a). Specifically, petitioner argues (1) that its "subscription fees" are not toll charges from intrastate services which vary in amount with distance and elapsed transmission time or which entitle the subscriber to an unlimited number of calls in the specified areas, and (2) that "subscription fees" are charges for services "other than communication services" which are not subject to the surcharge.

Analysis and Conclusion

As noted in the companion case, petitioner's attempt to recharacterize overhead measured by its fixed asset costs as "subscription fees" unrelated to services is misleading. Without those fixed assets in place to provide both intrastate and interstate long distance services to its clients, petitioner presumably would be out of business. That petitioner chooses to state its reimbursement of overhead separately on its billing under the designation "subscription fees" is irrelevant to whether they are taxable under the Emergency Act. As the STD correctly notes, it is a mandatory flat rate charge which is a condition precedent to obtaining intrastate, as well as interstate, long distance services.

Revenue and Taxation Code Section 41010 defines "Intrastate Telephone Communication Services" as "all local or toll telephone services where the point or points of origin and the point or points of destination of the service are all located in this state." Revenue and Taxation Code Section 41020 imposes a surcharge on "amounts paid by every person in this state for intrastate telephone communication service in this state...." Petitioner's flat rate monthly charge is a condition precedent to obtaining any intrastate long distance service whatsoever.

Revenue and Taxation Code Section 41011 defines "Charges for Services" to include "all charges billed by a service supplier for intrastate telephone communication services and shall mean local telephone services and include monthly service flat rate charges for usage, message unit charges and shall mean toll charges...." [Emphasis added.] That section further provides that "Charges for Services" shall not include "charges for any nonrecurring, installation, service connection or one-time charge for service or directory advertising, and...charges for other than communications service...." [Emphasis added.]

Revenue and Taxation Code Section 41010 is written in the disjunctive. The tax will lie if the charge is either for local telephone service or toll telephone service. The description of the source of the fee indicates it is not related to time and distance measurement which are part of the definition of "Toll Telephone Service" defined in Revenue and Taxation Code Section 41016. Revenue and Taxation Code Section 41015(a) defines "Local Telephone Service to mean both "(a) The access to a local telephone system, and the privilege of telephonic quality communication with substantially all persons having telephone... stations constituting a part of the local telephone system," and "(b) any facility or service provided in connection with a service described in subdivision (a)."

Fixed overhead expenses that petitioner incurred to operate its business patently relate to facilities provided in connection with access to the local telephone system described in subdivision (a). (Revenue and Taxation Code Section 41015(b).) It is difficult to perceive how the salary expenses of switchmen, operators, linemen, sales representatives, etc., all of whom provide services related to transmission, would not be included in the amounts recovered under the "subscription fees." Petitioner's flat rate charge guarantees that its net operating costs for both fixed assets and services will be covered by billing its clients a "subscription fee" calculated to cover its overhead. Services

provided in connection with access or use of the system fall within the definition of local telephone service which is subject to the surcharge. (Revenue and Taxation Code Section 41015(b).)

Petitioner's "subscription fees" are therefore subject to the surcharge under Revenue and Taxation Code Section 41020 because they are monthly service flat rate charges as defined in Revenue and Taxation Code Section 41010. It is my understanding that petitioner prevailed in litigation against the Board concerning whether it was subject to Emergency Act taxes prior to the time it obtained its CPUC tariff. The Department should confer with petitioner to verify when this took place and assure that only those post-tariff subscription fees are included in the measure of tax for this item.

If it is determined that some of these Emergency Act taxes being imposed in this case apply to a period prior to petitioner having received its CPUC tariff, petitioner may seek reconsideration on this issue.

Issue 4 - Taxes and CPUC Fees Collected from Customers

Summary

Petitioner notes that under Public Utilities Code Section 431, the California Public Utilities Commission (CPUC) is required annually to determine a fee to be paid by every telephone company or other company offering public utility services subject to its jurisdiction. Petitioner is authorized to collect from its customers an amount equal to the CPUC fee which petitioner is required to pay.

Petitioner further alleges that in addition to the CPUC fee, it also collects amounts from its customers for the Moore Act tax. Petitioner states it is authorized to pass on these charges to its customers under Rules No. 23 and 24 of its tariff filed with the CPUC. According to petitioner, the charges for the Moore Act tax and for CPUC fees are included in the separately stated line item on customer invoices designated as "State and Local Surcharges." Petitioner alleges that these reimbursed fees and taxes were erroneously included in the measure of tax subject to the Emergency Act surcharge. Petitioner alleges that Revenue and Taxation Code Section 41011 excludes from the definition of "Charges for Services" any "charges for other than communication services...."

The STD noted that the incidence of the Moore Act tax and the CPUC fees is on petitioner, not the customer. Petitioner's tariff allows it to pass through the expenses to its customers, but the tax is its own operating expense. Liability is imposed directly on petitioner, not as a custodian of funds collected from others, but as its personal liability. Since the STD contends that these charges are both intrastate and interstate in nature, it contends that they are not excluded from the Emergency Act surcharge.

Analysis and Conclusion

In the companion case, I determined that the incidence of tax for both the Moore Tax and the CPUC fees was on petitioner. I also found no grounds to exclude the amounts petitioner's clients reimbursed it for the separately stated fees/taxes appearing on its clients' invoices from the "gross revenues" subject to the Moore Act tax. In both instances, I found charges reimbursed by the client were directly related to intrastate telephone communication services.

Revenue and Taxation Code Section 41020 imposes the Emergency Act surcharge on "charges for services," which are defined, in pertinent part, under Revenue and Taxation Code Section 41011 as follows:

" . . . all charges billed by a service supplier to a service user for intrastate telephone communications services and shall mean local telephone service and include monthly service flat rate charges for usage, message unit charges and shall mean toll charges, and include intrastate-wide area telephone service charges. 'Charges for services' shall not include any tax imposed by the United States or by any charter city . . . 'Charges for services' shall not include . . . charges for other than communications service. . . ." [Emphasis added.]

Since I found that in order to obtain any telephone service whatsoever, whether intrastate or interstate, petitioner's clients had to reimburse it for the Moore Act taxes and CPUC fees, it follows that the items were taxable flat rate monthly service charges for usage. Thus, they are also properly and specifically included in the definition of charges for services subject to the Emergency Act surcharge.

Issue 5 - Disallowed Intrastate Interconnection Charges

Summary

Petitioner alleges that even though it cannot provide any additional exemption certificates for amounts it claims are exempt from the Emergency Act surcharge under the provisions of Revenue and Taxation Code Sections 41003, 41027, and 41046, that it nevertheless should be entitled to the exemptions it claimed. The code sections cited deal with charges made to nonprofit hospitals, educational organizations, public agencies, the United States, the Red Cross, and to charges arising from the collection and dissemination of news for the public press and WATS used by common carriers.

Analysis and Conclusion


Revenue and Taxation Code Section 41020 imposes the surcharge on amounts paid by "every person in the state for intrastate telephone communication service in this state...." The "gross revenues" from the entities petitioner claims were exempt from tax can only be determined to be nontaxable upon a finding (1) that they are not "persons" within the meaning of Revenue and Taxation Code Section 41003, (2) that they are constitutionally prohibited within the meaning of Revenue and Taxation Code Section 41017, or (3) that they are preempted by federal statute such as the one noted in Revenue and Taxation Code Section 41046.

A taxpayer seeking exemption from tax must prove entitlement by more than mere allegations. Credible evidence to support the exemption must be provided. [Paine v. State Board of Equalization, (1982) 137 Cal.App.3d 438.] In Hospital Service of California v. City of Oakland, (1972) 25 Cal.App.3d 402, 405, the Court stated that statutes granting exemption from tax must be reasonably, but strictly construed against the taxpayer and against the claimed exemption, and liberally construed in favor of the taxing authority. That Court also stated that the taxpayer also has the burden of showing he comes clearly within the exemption.

I concur with the STD that petitioner has not provided adequate documentary information to the STD to substantiate that the amounts which petitioner deducted as exempt on its returns met the aforementioned statutory or constitutional grounds for exclusion from the surcharge.

Recommendation

Redetermine without adjustment.


Janice M. Jolley, Staff Counsel
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Date